IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 29, 2007 Session

JOHN DAVID FRANKLIN v. OLGA DeKLEIN-FRANKLIN

Appeal from the Circuit Court for Hamilton County
No. 05-D-542 Jeff Hollingsworth, Judge

No. E2007-00577-COA-R3-CV - FILED APRIL 30, 2008

This is a divorce case. John David Franklin ("Husband") challenges the trial court's judgment on several bases. He contends (1) that the award of transitional alimony to Olga DeKlein-Franklin ("Wife") was error; (2) that the court erred in treating the entirety of two stock brokerage accounts as marital property; (3) that the court erred in failing to treat Husband's disability insurance proceeds as his separate property; (4) that the special master erred in excluding evidence of the premarital value of Husband's medical practice; (5) that the division of marital property is not equitable; and (6) that he is entitled to a new trial because of irregularities in the proceedings below. Wife also argues that the division of marital property is not equitable. So much of the trial court's judgment as awards Wife transitional alimony is hereby reversed. In all other respects, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part and Affirmed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, and SHARON G. LEE, JJ., joined.

Ben H. Cantrell, Nashville, Tennessee, for the appellant, John David Franklin.

Phillip C. Lawrence, Chattanooga, Tennessee, for the appellee, Olga DeKlein-Franklin.

OPINION

I.

Husband, now age 65, first met Wife, now 64, in Cancun, Mexico in 1983, where Husband had traveled with other members of his medical group, the Plastic Surgery Group, P.C. of

Chattanooga to operate on children with cleft palates and severe burns. Wife,[1] who can speak several languages fluently, was working as a translator in connection with the coordination of medical services for the Mexican children. When the parties first met, Wife had been married to her first husband since 1973. The couple had two children, T.A., born in 1976, and C.A., born in 1982. In 1987, Wife obtained a divorce and moved to Chattanooga with her two sons. Husband and his first wife were also divorced in 1987. Two children, J.D. and T.L., had been born to Husband's first marriage. The romantic relationship between Husband and Wife began sometime in 1987.

Upon her arrival in Chattanooga, Wife, because of a lack of established credit, could not qualify for a mortgage on the house she had picked out at 40 Rock Crest Drive in Signal Mountain. Husband bought the house from the owners for $185,000 and sold it to Wife for $170,000, financing $70,000 of the purchase price. Wife claims she gave Husband $25,000 on the front end of the transaction to give to the sellers and later gave him an additional $75,000 that he used toward the purchase.[2] According to Wife, the money she utilized to purchase the house came from her divorce settlement and the estate of her mother. When Wife sold the property in 1994 for $187,000,[3] she placed the net proceeds in a joint account at a brokerage house, J.C. Bradford. The funds now appear in the joint names of the parties in an account at another brokerage house, UBS.

On November 6, 1987, Husband bought a house on Jarnigan Road in Chattanooga for $238,500. Before the purchase was finalized, the property was rezoned from residential to commercial, significantly increasing its value. The balance of the purchase price was paid during the next year. In 1994, Husband sold the property to Medical Finance, a corporation of which Husband was the sole shareholder. The consideration recited in the deed is $600,000. In 1997, the corporation sold the property to Jarnigan Road Limited Partnership for $615,570.50. The proceeds from the sale of the Jarnigan Road property ultimately went into Raymond James Account # 79646257, a joint account with Wife.

Husband and Wife were married on June 10, 1989. A month before their marriage, the parties bought a vacant lot on Ballard Bluff Circle in Signal Mountain. Husband paid $140,000 for the lot. The deed was recorded in both names as tenants in common. In 1991, the parties began construction of a house on the lot – one that ultimately cost about $1 million. According to Husband, approximately $400,000 of the cost of construction came from Husband's premarital funds, with the balance coming from Husband's earnings during the marriage. Wife testified that

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[1]Wife is a native of the Netherlands.

[2]According to the special master's report, it is unclear whether Wife actually gave Husband $25,000 toward the purchase of the home. In any event, the special master concluded that a resolution of this question was not critical or necessary for a determination of the issues in this case. Because of the *relatively* small amount involved, we agree.

[3]According to the testimony of the Chattanooga attorney who purchased the home, Husband received a separate check at the closing for the payoff of the $70,000 mortgage.

after the marriage, the couple saved money from Husband's salary and bonuses and applied those toward the construction of the house. Wife claims additional funds for construction were derived from Husband's salary as he earned it.

Wife testified that, for her contribution to the home, she spent several hours a day applying her artistic and decorating talents toward the selection of finishes for the house. Additionally, Wife claims that she utilized her organizational and administrative skills to coordinate and oversee the work of the subcontractors. The special master found that the current value of the residence is $1.5 million.

In 1993, Husband sold for $104,020 an interest in two condominiums he had acquired pre-marriage in 1987. The money received from the sale was placed in a savings account and ultimately transferred to Raymond James Account # 79646257, a joint account with Wife.

In 1994, Husband suffered from a venous ulcer on his leg. The condition would not heal. As a result, Husband could no longer perform microvascular reconstructive surgery. Then, in 1995, after earning approximately $600,000 to $700,000 per year for a number of years, Husband was forced to leave his medical practice over some personal differences with members of the group. In February 1997, Husband was paid $1 for his interest in the group and $425,000 in compensation. From the latter, he netted $295,782.70 after withholding deductions. These funds were deposited into Husband's Morgan Keegan Account, which later became Raymond James Account #79646257, another joint account with Wife.

Husband subsequently moved into a suite of offices at Erlanger Hospital, where he practiced under the name of Specialists in Plastic Surgery, P.C. This group was organized on September 10, 1995. Husband's practice there consists of aesthetic surgery and treatment of skin cancers and some wounds. Husband's W-2 from 2004 reflects his income of approximately $500,000 from that group. The special master determined that the value of his interest in Specialists in Plastic Surgery at the date of the divorce was $100,000.

Wife was not gainfully employed from the time of her marriage to Husband until 1995, at which time she began working in his new medical practice. According to Wife, she helped Husband establish Specialists in Plastic Surgery. She testified that she set up the office by furnishing and decorating it, hiring office personnel, and organizing the administrative aspects of the office. Wife asserts that after the office was opened on October 15, 1995, she answered the phone, scheduled appointments, served as a liaison between the doctors and patients, and assisted in transferring patient charts from the Plastic Surgery Group to Husband's new practice. In 1997, Wife became the practice manager, a position she maintained until Husband forced her to quit in 2005. As to her role as practice manager, Wife testified that she did payroll, entered all the coding and the charges into the computer, prepared the advertising, negotiated insurance contracts, and hired personnel. She received a yearly salary of approximately $48,000 plus bonuses. According to Wife, she paid out of these earnings the utility bills for their home, the housekeeper's salary, grocery expenses, phone, internet and cable bills, as well as exterminator services.

Husband had an occupational disability policy with UnumProvident that he had acquired in 1983 or 1984. Because Husband had lost the ability to perform microsurgery, he pursued a claim under the policy. Although the claim was initially declined, Husband ultimately settled the matter in 2001 for a lump sum of $525,000 and monthly payments of $9,000 until his death or his 70th birthday. The money received from the settlement appears to have gone into a savings account at First Tennessee Bank.

Wife's two children were raised in the parties' household. Husband claims that he supported them, sent them to school, and paid for T.A.'s drug treatment and special schools. In November 2002, C.A. died after an automobile accident in a $38,000 car purchased for the youth but owned by Husband. With Husband serving as executor of C.A.'s estate, Wife recovered $300,000 from Husband's uninsured motorist carrier. According to Husband, from these proceeds, Wife spent $28,000 for further drug treatment for T.A., purchased a car for his girlfriend, and also paid T.A.'s rent while he was in treatment. Husband views Wife as overly indulgent with her children and resents T.A. because of his history of drug abuse. Husband testified that arguments regarding T.A. were the main reason for the divorce. Furthermore, Husband viewed Wife's grief after C.A.'s death as obsessive.

Wife, an accomplished painter, is a volunteer art teacher one day a week at Chattanooga's Dawn School, a school for mentally-challenged children. She enrolled in college in the spring of 2006, taking classes in art history, mathematics, English composition, and art. Wife testified that she planned to get a master's degree in five years and an art therapist's degree in two more years. Prior to these educational pursuits, Wife's last formal education was in 1961 in her native land.[4] Wife stated that she had been paying for her education out of funds from the settlement of C.A.'s estate. She testified that she curtailed her therapy and counseling due to the expense.

With the goal of building a surgery center, Husband and Dr. Christopher Chase, one of the other surgeons involved in the Specialists in Plastic Surgery practice, formed Franklin Chase, LLC. For $600,000, they purchased a piece of property on Third Street in Chattanooga near Erlanger and Memorial Hospitals. Money was loaned to the LLC by Husband from a line of credit secured by the marital residence on Ballard Bluff Circle. In 2005, after setbacks in the development of the surgery center, Husband and Dr. Chase, in order to fund their salaries, borrowed $242,000 from First Tennessee Bank. This is an outstanding debt of Specialists in Plastic Surgery.

Husband filed a complaint for divorce on March 11, 2005. The grounds alleged were inappropriate marital conduct and, in the alternative, irreconcilable differences. The complaint

[4]In Holland, Wife had finished high school and completed two years of college, studying law, economics, foreign languages and statistics. She worked as a secretary for 6 years in the Netherlands before coming to the United States. Upon arriving in this country, Wife worked for two years at the Belgium-American Chamber of New York.

prayed for an equitable distribution of the parties' assets and liabilities. On the same day, a temporary mutual injunction was entered, restraining and enjoining the parties from the following acts:

> (1) (A) Transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party or an order of the Court, of any marital property.
>
> (B) Expenditures from current income to maintain the marital standard of living and the usual and ordinary costs of operating a business are not restricted by this injunction. Each party shall maintain records of all expenditures, copies of which shall be available to the other party upon request.
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> (2) Voluntarily canceling, modifying, terminating, assigning or allowing to lapse for nonpayment of premiums, any insurance policy, including but not limited to life, health, disability, homeowners, renters and automobile, where such insurance policy provides coverage to either of the parties or the children, or that names either of the parties or the children as beneficiaries without the consent of the other party or an order of the Court. "Modifying" includes any change in beneficiary status.
>
> (3) Harassing, threatening, assaulting or abusing the other and from making disparaging remarks about the other to or in the presence of any children of the parties or to either party's employer.
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> This injunction shall not preclude either party from applying to the Court for further temporary orders, an expanded injunction or modification or revocation of this temporary injunction.
>
> This temporary injunction remains in effect against both parties until the final decree of divorce or order of legal separation is entered, the petition is dismissed, the parties reach agreement or until the Court modifies or dissolves the injunction.

This language tracks the statutorily-required restraining order language found in Tenn. Code Ann. § 36-4-106 (d) (Supp. 2007). On April 13, 2005, Wife filed her answer and counterclaim. She alleged the same grounds for divorce, prayed for an equitable division of the marital estate, and requested an equitable division of the marital debt. Wife sought alimony from Husband for her support and maintenance "both for the time pending the hearing of this case and permanently."

In May 2005, Husband invested $71,500 in a company named Premier Log Homes and Structures. According to him, the investment was made to help his nurse and her husband. In connection with this transaction, Husband signed a $500,000 guaranty.

After Wife filed an emergency application for exclusive possession of the marital residence and for a temporary restraining order, the trial court, on June 5, 2005, awarded Wife exclusive possession of the marital home without prejudice to either party as to the ultimate award of the residence. However, due to T.A.'s past history of drug use, Wife was enjoined from allowing him to enter the home.

On July 7, 2005, Wife moved for the appointment of a special master. She further requested that the then-scheduled trial date of July 18, 2005 be continued. On July 22, 2005, the trial court granted a continuance to August 30, 2005, and ordered the parties to attend mediation. On August 28, 2005, Wife moved for another continuance and renewed her prior motion for the appointment of a special master. Husband objected to the use of a special master, asserting that "an appointment to a Special Master would delay the matter further." When the parties appeared for trial on October 17, 2005, "the Court determined that the case should be referred to a Special Master." Donald J. Aho was initially appointed as special master and hearings were scheduled before him on November 9, 10, and 11.

After negotiations between the parties, Wife decided to move out of the marital residence and purchase her own home. However, Wife could not qualify for a home loan because of the $600,000 obligation on the line of credit. In October 2005, Husband paid off the line of credit from "his savings account" – the account containing the funds from the settlement on his disability policy – in return for a quitclaim from Wife of any interest in the Ballard Bluff Circle home. On November 2, 2005, the trial court ordered Wife to vacate the marital residence no later than November 15, 2005. According to Husband, he used funds he had accumulated in the savings account and Raymond James Account #79646257 to pay off the line of credit that had been secured to help build the surgery center.

On November 16, 2005, the court entered an order acknowledging that Wife had refused to waive a potential conflict of interest with Mr. Aho. The court substituted Glenna M. Ramer as special master, providing in its order that Ms. Ramer was "to exercise all of the duties and powers conferred by Rule 53, Tennessee Rules of Civil Procedure . . . ." She was empowered to do the following:

> a. Take evidence and to rule on objections to evidence;
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> b. Determine the marital and separate property of the parties and the values of the same;
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> c. Determine any marital debt;

> d. ... [make] a recommendation to the Court as to the special master's opinion as to the equitable division of the marital estate, the amount and duration of an alimony award to [Wife], if any, and the award of attorney's fees to [Wife]'s counsel, if any; and
>
> e. Report to the Court the findings and conclusions pursuant to Rule 53.04, Tennessee Rules of Civil Procedure.

The order appointing the special master refers to "the express stipulation and consent of the parties" for the special master to make recommendations to the court "as to the equitable division of the marital estate, the amount and duration of an alimony award to [Wife], if any, and the award of attorney's fees to [Wife]'s counsel, if any . . . ."

On December 7, 2005, the trial court ordered the parties divorced based upon their Tenn. Code Ann. § 36-4-129 (2005) stipulation of grounds for divorce.

On March 6, 2006, Wife moved the court for an order allowing her to amend her counterclaim to add Raymond James & Associates, the brokerage house handling a large portion of the alleged marital estate, as a third-party defendant. The amended counterclaim prayed for a temporary restraining order to prevent the third-party defendant from allowing either party to withdraw or transfer funds from the accounts under management. Wife further asserted that Husband had violated the earlier restraining order

> by spending the approximate amount of $107,000 for a new BMW automobile without approval of the Court and by attempting to conceal the purchase of this automobile; by either co-signing or personally guaranteeing a loan obligation for several hundred thousand dollars for a business venture known [as] Premier Log Homes in which he ow[n]s a very small interest and by investing approximately $75,000 in that business, all of which was done without the approval of the Court; by diverting funds in the approximate amount of $200,000 from his medical practice without the prior approval of the Court to waste on an abortive medical building project that has been determined to be impractical because of the small size of the property upon which it was intended to be built; by taking sums of money from his savings account the use of which he is unable to explain and to account for; and by incurring loans and indebtedness for his medical office building project without approval of the Court.

On March 13, 2006, the trial court granted the requested amendment and entered the prayed-for temporary restraining order. Raymond James & Associates was added as a third-party defendant and was restrained from permitting access to the following accounts: Annuity Account # 60160378, SEP

Account # 79254674; IRA Account # 74254867; SEP Account # 74256215; Joint Account # 79646257; and Joint Account # 79645875.

The special master filed her report on August 16, 2006. Of the total marital estate of $6,801,173 found by the special master, assets totaling $3,787,239 in value were awarded to Husband, and assets totaling $3,013,934 in value were awarded to Wife. As can be seen, the dollar differential was $773,305, and the percentage differential was 11.38% (55.69% awarded to Husband and 44.31% awarded to Wife). Wife immediately moved the trial court to approve the report. Husband was given until September 6, 2006, to file his exceptions. He later filed exceptions. On November 30, 2006, the trial court entered a memorandum and order sustaining some of Husband's exceptions and overruling others.

The trial court entered a final judgment on December 19, 2006. The report of the special master was incorporated by reference into the final judgment and confirmed, except as modified by the trial court's memorandum of November 30, 2006. The trial court adopted the findings of the special master as to the marital estate, but significantly modified the award to increase the portion awarded to Husband and to decrease that which was awarded to Wife. Husband was awarded $4,252,643 of marital assets or 62.53% while Wife was awarded $2,548,530 or 37.47%. This increased the dollar differential from $773,305 in Husband's favor to $1,704,113, and the percentage differential from 11.38% to 25.06%. In addition to dividing the marital estate, the court awarded Wife transitional alimony of $2,500 per month for a period of 24 months.

Wife filed a motion to alter or amend the judgment on January 11, 2007. Husband filed a motion to alter or amend and for a new trial on January 18, 2007. The court granted one of Husband's grounds and otherwise denied both motions on February 8, 2007. Husband filed a notice of appeal on March 7, 2007. Wife filed a notice of appeal on March 9, 2007.

II.

Husband presents the following issues:

> 1. The case should be reversed and remanded for a new trial for a determination of the main issues in controversy by the trial court instead of the special master.
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> 2. Whether the trial court erred in awarding Wife transitional alimony.
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> 3. Whether the doctrine of concurrent findings, Tenn. Code Ann. § 27-1-113, is applicable in this case.
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> 4. Whether the trial court erred in classifying 100% of Raymond James Accounts # 74254867 and # 79646257 as marital property.

5. Whether the trial court erred in not recognizing that Husband's disability insurance proceeds remained his separate property.

6. Whether the special master erred in excluding evidence of the premarital value of Husband's practice and his other financial contributions to the marital estate.

Both parties challenge the trial court's division of the marital estate.

III.

Pursuant to Tenn. R. App. P. 13(d), "review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." However, a trial court's conclusions of law are not afforded such a presumption. ***Kendrick v. Shoemake***, 90 S.W.3d 566, 569 (Tenn. 2002).

The trial court's order referring certain matters to a special master, the special master's report, and the trial court's order on the report affect our standard of review on this appeal. *See* ***Manis v. Manis***, 49 S.W.3d 295, 301 (Tenn. Ct. App. 2001); ***Archer v. Archer***, 907 S.W.2d 412, 415 (Tenn. Ct. App. 1995). Generally, concurrent findings of fact by a special master and a trial court are conclusive and cannot be overturned on appeal. ***Manis***, 49 S.W.3d at 301. However, a concurrent finding is not conclusive where it pertains to an issue not properly referred to a special master, where it is based upon an error of law or a mixed question of law and fact, or where it is not supported by any material evidence. ***Id.*** On appeal, we review findings of a trial court rejecting or modifying a special master's findings under the standard of Tenn. R. App. P. 13(d).

Our review of a trial court's division of marital property is *de novo* upon the record. Tenn. R. App. 13(d); ***Dellinger v. Dellinger***, 958 S.W.2d 778, 780 (Tenn. Ct. App. 1997). Trial courts have wide discretion with respect to the manner in which marital assets are divided, and, therefore, marital property divisions are given great weight on appeal. ***Id.*** (citing ***Wade v. Wade***, 897 S.W.2d 702, 715 (Tenn. Ct. App. 1994); ***Wallace v. Wallace***, 733 S.W.2d 102, 106 (Tenn. Ct. App. 1987)). In this case, the trial court's decision on the distribution of marital property is presumed correct unless the evidence preponderates otherwise. ***Wallace***, 733 S.W.2d at 107.

IV.

A.

Husband's first issue contests the use of the special master in this case. He contends that referrals to special masters pursuant to Rule 53 of the Tennessee Rules of Civil Procedure are limited to "collateral, subordinate, and incidental issues and the ascertainment of ancillary facts, while the main issues in controversy and the principles on which these issues are to be adjudicated must be

determined by the trial court." ***Frazier v. Bridgestone/Firestone, Inc.***, 67 S.W.3d 782, 784 (Tenn. Sp. Workers Comp. 2001). Husband asserts that in this case, all the main issues in controversy were referred to the special master. According to Husband, the only matter left to be independently decided by the trial court was the divorce, an issue about which the parties stipulated. Husband argues that, therefore, the case should be reversed and remanded for a new trial so that the parties may have the main issues in controversy decided independently by the trial court.

Husband relies on ***Ingram v. Stein***, 126 S.W.2d 891 (Tenn. Ct. App. 1938), a case in which this court found that the matter referred "was the main controversy in the cause, and for this reason, although it was a question of fact, we are constrained to hold that the Chancellor was in error in referring it to the Master." ***Id.*** at 892. Relying upon Gibson's Suits in Chancery, this court held that "it may be stated, generally, that the main issues of the controversy, and the principles on which these issues are to be adjudicated, must be determined by the Chancellor, while collateral, subordinate, and incidental issues, and the ascertainment of facts ancillary to the determination of the main issues, or to the execution of the decree, may be referred to the Master." ***Id.*** *See also* ***Reed Bros. Stone Co. v. Pittman Constr. Co.***, 101 S.W.2d 478, 481-82 (Tenn. Ct. App. 1936).

Wife argues that the holding in ***Frazier*** is limited to workers' compensation cases. She further asserts that the ***Ingram*** and ***Reed Bros. Stone Co.*** cases, decided before the adoption of the Tennessee Rules of Civil Procedure that now govern the process of referrals to special masters, appear to be in conflict with those Rules. Wife additionally contends that even if the referral was in some way improper or if the special master went beyond the trial court's order of referral, or decided issues that should have been reserved for adjudication by the trial court, the only consequence is that the standard of review on appeal is affected; reversal and remand are not required. *See* ***Archer***, 907 S.W.2d at 415-16; *see also* ***Myrick v. Johnson***, 160 S.W.2d 185, 189 (Tenn. Ct. App. 1941) ("[i]f the reference to the master was improper, the only consequence of this would be that the Chancellor's concurrence with the master's report would not be binding upon us as a concurrent finding of fact.") (citing ***Ingram v. Stein***, 126 S.W.2d 891 (Tenn. Ct. App. 1938)).

Rule 53 of the Tennessee Rules of Civil Procedure governs the appointment of special masters. Specifically, Rule 53.01 allows a court to appoint a special master for any matter pending before it. Rule 53.02, while authorizing a trial court to restrict the reference to particular issues, does not preclude a special master from addressing the entirety of the issues in a case. Moreover, a trial court retains its judicial power to make the ultimate determination of the issues in the case by virtue of Rule 53.04(2), which, applied to non-jury actions, provides that

> [t]he court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

We note that Husband's verbalized objection during the proceedings below to the use of a special master was *limited* to the possibility that the appointment might delay the ultimate resolution of the case, not that the main issues in controversy were being referred to a special master or that the

referral was an improper delegation of the province of the trial court. In ***McClellan v. Bd. of Regents***, 921 S.W.2d 684 (Tenn. 1996), the Supreme Court held that a party could not be heard to complain of certain procedures in an administrative hearing when the party acquiesced in those procedures, and the challenge could not be raised on appeal to those procedures to which acquiescence had been given. ***Id.*** at 690 ("[a]llowing parties to acquiesce in the procedures, but to challenge those same procedures on appeal is inefficient and unreasonable"). *See also* ***Catlett v. Indemnity Ins. Co. of N.A.***, 914 S.W.2d 76, 78 (Tenn. 1995).

In this matter, Husband entered into a stipulation that the special master could make recommendations to the trial court on the full spectrum of issues in the case, in effect waiving any objection that he might have to the appointment of a special master. The parties had expressly agreed that the special master was empowered to make recommendations to the trial court as to the equitable division of the marital estate, the amount and duration of an alimony award, if any, and the award of attorney's fees, if any. We view Husband's acquiescence and participation in establishing the role of the special master as tantamount to a waiver of any legal objection he had to the special master's involvement. He may not now take an inconsistent and contrary position on appeal, *i.e.*, that the appointment of the special master was improper.

Even if Husband's issue regarding the referral to the special master was not barred by the concept of waiver, we would still conclude that his objection is without merit. From a review of the trial court's memorandum opinion rejecting the recommendation of the special master as to the proportions of the marital estate that each party was to receive, it is apparent that the trial court reviewed the record of the special master's hearing carefully to make an independent determination as to the equitable division of the marital estate. Husband cannot demonstrate that a different result would have been reached if the trial court had received, in a bench trial, the same evidence that was presented at the special master's hearing or that any prejudice has resulted to Husband by reason of the special master procedure.

Husband also contends that neither the special master nor the trial court made any findings about the contribution of Husband's premarital estate to the marriage. Husband argues that, pursuant to Tenn. Code Ann. § 36-4-121(c)(5) and (7) (2005), such findings are critical to a consideration of an equitable division of marital property. Husband relies upon ***Brock v. Brock***, 941 S.W.2d 896 (Tenn. Ct. App. 1996), in which we noted that "[t]he wealth that Husband accumulated before the marriage, which he and he alone produced, was the 'seed' wealth for the substantial marital estate we now have before us." ***Id.*** at 904. According to Husband, the ratio of the value he brought into the marriage compared to that of Wife is approximately 18 to 1.

This court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard. ***Mercer v. Vanderbilt Univ., Inc.***, 134 S.W.3d 121, 131 (Tenn. 2004). A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. ***Id.***; ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001). Reviewing courts will not disturb a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate court

would not have chosen. *See* ***Overstreet v. Shoney's, Inc***., 4 S.W.3d 694, 708 n. 7 (Tenn. Ct. App. 1999).

In the case before us, the trial court did recognize that Husband "brought substantial assets into the estate and his contribution to the acquisition and preservation of marital assets was greater than those of [Wife]." As noted by Wife, the trial court's recognition of the quantity of Husband's premarital property, however uncertain the quantity may have been, was a significant factor in the trial court's decision to make an unequal division of the marital estate weighted in Husband's favor. While Tenn. Code Ann. § 36-4-121(c) (2005) requires that the trial court "consider all relevant factors" in making an equitable distribution of marital property, the statute does not mandate that the court make written findings of fact. ***Woods v. Woods***, No. M2006-01000-COA-R3-CV, 2007 WL 2198110, at *1 (Tenn. Ct. App. M.S., filed July 26, 2007). We will not alter the trial court's decision simply because the special master and the trial court failed to discuss each of the applicable statutory factors and how those factors impacted its rulings. ***Id.*** at *2. There has been no demonstration by Husband that if specific findings as to the quantity of Husband's premarital property had been made, the division of the marital estate would have been different.

Husband's real bone of contention on this appeal appears to be the fact that Wife – who Husband, in essence, complains contributed insignificantly to the wealth of the marriage – is receiving a significant portion of the marital estate. Husband specifically asserts that at the time of his marriage to Wife, his practice included approximately $350,000 in accounts receivable and other assets that brought the total value of the practice to $500,000. When Husband offered proof of the value of his practice at the time of the marriage, the special master excluded the proof as irrelevant. Husband asserts that evidence of a spouse's financial contribution to the marriage provides a sufficient basis for awarding a larger share of the marital estate. ***Altman v. Altman***, 181 S.W.3d 676, 683 (Tenn. Ct. App. 2005).

Wife asserts that the value of Husband's interest in his former medical group would have no relevance because the interest was lost during the marriage. She contends that the withheld compensation Husband was paid from the group was compensation clearly earned during the marriage. Indeed, by 1995, when Husband left his old practice, Husband had been married to Wife for six years, and the earnings or compensation for services for which he was being paid in the settlement would surely not predate the parties' marriage. The checks from the former practice were deposited by Husband into his Morgan Keegan account that later became joint account # 79646257 at Raymond James. Since the settlement funds were for income earned during the marriage and were deposited into an account that became the parties' joint property, we must agree with Wife that the relevance of the premarital value of Husband's interest in the former practice is dubious. The special master's exclusion of evidence of the premarital value, even if somehow improper, was entirely harmless in the context of the issues in this case.

Simply put, Husband is refusing to acknowledge the general principles bearing on the division of property. In ***Brock v. Brock***, this court discussed such as follows:

> In divorce cases, Tennessee recognizes two distinct types or classes of property, i.e., "marital property" as defined at T.C.A. § 36-4-121(b)(1) and "separate property" as addressed at T.C.A. § 36-4-121(b)(2). The distinction is important because the relevant statutory provision, T.C.A. § 36-4-121(a), "provides only for the division of marital property." ***Batson v. Batson***, 769 S.W.2d 849, 856 (Tenn. App. 1988). Implicit in the statute's mandate is the concept that assets properly classified as "separate property" are not divided between the parties, but rather are set aside to the spouse to whom the property is "separate" in nature. *Id.* (". . . it is incumbent on the trial court . . . to give each party their separate property, . . .").
>
> Also implicit in the statutory scheme for the division and/or distribution of marital and separate property is the concept that the property upon which the trial court acts is, generally speaking, the property owned by the parties, individually or jointly, at the time of the divorce. *See, e.g.*, T.C.A. § 36-4-121(b)(1)(A) which defines "marital property" in terms of property
>
> > . . . acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, . . .
>
> As a corollary to this principle, and again speaking in general terms, property once owned by a spouse, either as separate property or marital property, but not owned by either spouse at the time of divorce, is not subject to classification and division or distribution when the divorce is pronounced. This is because, generally speaking, a court cannot divide and/or distribute what is "not there" – property no longer owned by the parties, individually or jointly, at the time of the divorce.

Id., 941 S.W.2d at 900 (footnotes omitted). Further, under certain circumstances, property generally deemed separate may be found to have been "transmuted" into marital property:

> [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property. One method of causing transmutation is to purchase property with separate funds but to take title in joint tenancy. This may also be done by placing separate property in the names of both spouses. The rationale underlying both these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift

> to the marital estate . . . The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Batson v. Batson, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988) (citing 2 H. Clark, *The Law of Domestic Relations in the United States,* § 16.2 at 185 (1987)) (brackets in original). As we noted in ***Brock***,

> [t]he definitions of "separate property" and "marital property" found at T.C.A. § 36-4-121 are for the purpose of aiding a court in properly classifying property owned by one o[r] both of the parties *at the time of their divorce*. In the instant case, neither of the assets in question was owned by either of the parties at the time of the divorce. Those interests had been disposed of or otherwise liquidated at an earlier time. The property interests represented by these assets were merged into the "wealth" of the marriage.
>
> We are not aware of any authority, and counsel has not directed us to any, for the proposition that assets of a spouse at the time of marriage, but not owned by him or her at the time of the divorce, are to be carved out of the marital estate as separate property for the benefit of that spouse at the time of the divorce.
>
> * * *
>
> Husband is not correct in claiming an automatic dollar-for-dollar credit against the marital estate for the "reasonable market value" of property owned by him at the time of the marriage, but not owned, in whole or in part, by him at the time of the divorce. . . .

Id., 941 S.W.2d at 901 (emphasis in original).

The master did not err in declining to take evidence as to the value of property no longer owned by Husband or property that has become transmuted into marital property. Husband has established no reasons that this case should be reversed and remanded for a new trial.

B.

Husband's next issue on appeal is that the trial court's award of transitional alimony was improper. Husband asserts that the record lacks any evidence justifying such an award.

Transitional alimony "is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences

of a divorce . . . ." Tenn. Code Ann. § 36-5-121(g)(1) (2005). While the special master had recommended transitional alimony of $3,500 per month for 24 months plus two annual payments of $2,500 for 5 years, the trial court awarded Wife transitional alimony in the amount of $2,500 per month for a period of 24 months. After considering the allocation of income-producing assets to Wife, the trial court found the special master's recommendation on this issue "to be excessive and unwarranted."

Trial courts have broad discretion in determining the type, amount and duration of alimony, depending on the particular facts of each case. *See* ***Burlew v. Burlew***, 40 S.W.3d 465, 470 (Tenn. 2001); ***Crabtree v. Crabtree***, 16 S.W.3d 356, 360 (Tenn. 2000); ***Sullivan v. Sullivan***, 107 S.W.3d 507, 511 (Tenn. Ct. App. 2002). Since alimony is largely a matter in the discretion of the trial court, appellate courts are not inclined to alter a trial court's award of alimony, unless the trial court applied an incorrect legal standard or reached a decision not supported by the facts that causes an injustice to the party complaining. ***Eldridge***, 42 S.W.3d at 85. Findings of fact by the trial court are presumed to be correct unless the evidence preponderates otherwise. Tenn. R. Civ. P. 13(d).

Tenn. Code Ann. § 36-5-121(i) provides as follows:

> (i) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:
>
> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
>
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
>
> (3) The duration of the marriage;
>
> (4) The age and mental condition of each party;
>
> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
>
> (7) The separate assets of each party, both real and personal, tangible and intangible;
>
> (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
>
> (9) The standard of living of the parties established during the marriage;
>
> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
>
> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
>
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i) (2005).

The primary considerations in any alimony award are the need of the recipient spouse and the ability of the other spouse to provide support. ***Robertson v. Robertson***, 76 S.W.3d 337, 342 (Tenn. 2002); ***Bogan v. Bogan***, 60 S.W.3d 721, 730 (Tenn. 2001). Orders for support are not intended to be punitive. ***Anderton v. Anderton***, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998); ***Duncan v. Duncan***, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984) (unneeded support may not be awarded as punishment).

Husband argues that Wife has her own home, received $3,000 per month in temporary support during the pendency of the divorce, and has a $39,000 Lexus. He further notes that Wife received $300,000 in insurance proceeds after her son's death, and that after the payment of attorney's fees and subrogated medical expenses, the balance in the settlement fund was about $240,000. According to Husband, Wife has $318,979 in separate property, including $78,979 in cash. Husband claims that Wife has paid $28,000 from the settlement fund for T.A.'s drug treatment, purchased a car for T.A.'s girlfriend, and, for a while, was paying her son's rent. Husband contends, therefore, that Wife is asking him to be responsible for expenditures such as these.

In the final judgment, Wife was awarded $1,176,416 in cash. In addition, she received $81,950 in the UBS account and approximately $1,300,000 in other assets. Because Wife will receive a substantial amount of property, Husband asserts that Wife does not need transitional alimony and that the court abused its discretion in awarding it in this case.

Wife contends that Husband has a far greater earning capacity relative to hers. She notes that Husband, in addition to his income as a surgeon, will also receive disability income insurance payments of $9,000 per month until October 2012 when Husband reaches age 70. Wife further stresses that the difference between the education and training of each party is considerable, as Husband is a skilled, practicing surgeon, while Wife is in the process of securing further education and training to improve her earning capacity to a reasonable level. The trial court found that "it is clear that [Husband] has much greater earning capacity than [Wife]."

Wife also asserts that she made tangible and intangible contributions to the marriage and the increased earning power of Husband. Jane Mann, a long-time friend of Husband and Wife, quoted Husband as stating that Wife had been "instrumental in helping him get his business started and that he couldn't have done it without her." Ms. Mann also noted that Husband had commented that Wife, while she was the practice manager, was doing a great job in keeping the office in order and in dealing with employees. Ms. Mann further testified regarding the contributions Wife made in overseeing the construction of the parties' house in 1991. Another mutual friend, Janet Burgos, recounted that Husband remarked that he could not have set up his new practice without Wife's assistance. The trial court concluded that Wife "did make substantial contributions to the improvement of Plaintiff's medical practice."

Husband and Wife were married for over 16 years, from June 10, 1989, until the divorce was granted on December 7, 2005. The trial court found that Husband "has had health problems and does not have the earning capacity he once had. [Wife] is in good health and has some job skills." Wife observes, however, that Husband is still able to practice surgery, although not the microsurgery he once performed.

Several facts in this case are particularly relevant to the issue of whether Wife has demonstrated a need for alimony. She received cash of $1,176,416. She has a house valued at $140,000 and a 2005 Lexus found by the trial court to be worth $39,640. She has a "separate property" savings account with a balance of $78,979. While Husband was awarded the former marital residence, Wife, in effect, retains a $200,000 interest in that property. In total, she received marital property valued at $2,548,530 and separate property totaling $318,979.

In our judgment, there is no material evidence to support a finding that Wife has a need for alimony of any kind. Hence, we hold that the trial court abused its discretion in awarding Wife transitional alimony of $2,500 per month for 24 months. The trial court's award of alimony is reversed *in toto*.

C.

The common view of concurrent findings is based on Tenn. Code Ann. § 27-1-113 (2000), which provides as follows:

> 27-1-113. Findings of fact – Scope of review. – In all cases tried on the facts in a chancery court and afterwards brought for review to the court of appeals, the court of appeals shall, to the extent that the facts are not stipulated or are not concluded by the findings of the jury, make and file written findings of fact, which thereupon shall become a part of the record. Before any such findings shall become final, reasonable opportunity shall be afforded the parties to examine the findings and to ask for different or additional findings. *Where there has been a concurrent finding of the master and chancellor, which under the principles now obtaining is binding on the appellate courts, the court of appeals shall not have the right to disturb such finding.* To the extent that the findings of the chancery court and the court of appeals concur, they shall, if there be any evidence to support them, be conclusive upon any review of the facts in the supreme court; to the extent that they do not concur, they shall be open to examination in that court. The court of appeals shall not be limited to the consideration of such facts as were found or requested in the lower court, but it shall independently consider and find all material facts in the record; and either party, whether appellant or not, may assign error on the failure of the chancellor to find any material fact, without regard to whether such fact was found or requested in the lower court. This shall not apply to any case tried in the chancery court upon oral testimony.

Id. (emphasis added). "A concurrent finding of a Special Master and a Trial Court is conclusive on appeal except where it is upon an issue not proper to be referred, where it is based on an error of law or a mixed question of fact and law or where it is not supported by any material evidence." ***Manis,*** 49 S.W.3d at 301.

Husband initially argues that the statute applies only to concurrent findings by a master and a chancellor and does not apply to a concurrent finding by a master and a circuit court judge. Husband contends that the scope of review in this case is therefore governed by Tenn. R. Civ. P. 13(d).

The "concurrent finding rule" is most often applied in cases appealed from chancery courts. It has been, however, applied to cases appealed from circuit courts. In ***Moore v. Moore***, 460 S.W.2d 844, 846 (Tenn. 1970), the Supreme Court said that suits for divorce are treated as chancery suits. It would naturally follow that because divorce proceedings are in the nature of chancery suits, the

concurrent finding rule applies to all divorce cases, whether tried in a circuit or chancery court. In ***Jones v. Jones***, 486 S.W.2d 927 (Tenn. Ct. App. 1972), it was stated that proceedings for divorce

> and all subsequent proceedings thereunder are inherently equitable in nature. Even though the matter is tried in the Circuit Court, it is yet a Chancery matter. In hearing matters of this nature, the Circuit Judge is clothed with all the powers of a Chancellor and the matter is tried as a Chancery matter and governed by the rules of the Equity Court.

Id. at 931 (citing ***Broch v. Broch***, 47 S.W.2d 84 (Tenn. 1932) and ***Kizer v. Bellar***, 241 S.W.2d 561, 563 (Tenn. 1951)).

Husband also contends that what amounts to an equitable division of a marital estate is a question of law or a mixed question of law and fact not properly referred to the special master. The concurrent finding rule, applying only to findings of fact, does not apply to questions of law or to mixed questions of law and fact. ***Long v. Long***, 957 S.W.2d 825, 829 (Tenn. Ct. App. 1997); ***Genesco, Inc. v. Scolaro***, 871 S.W.2d 487, 492 (Tenn. Ct. App. 1993). We note, however, that the recommendation of the special master concerning the equitable division of the marital estate, indeed a mixed question of law and fact, was a recommendation that the trial court did not adopt. Thus, there was no concurrent finding as to the equitable division of the marital property. The statute does not apply if the master and the trial court do not actually concur. *See* ***Watson v. Watson,*** No. W2004-01014-COA-R3-CV, 2005 WL 1882413, at *9 (Tenn. Ct. App. W.S., filed August 9, 2005). However, "[p]roperty classification is a question of fact." ***Bilyeu v. Bilyeu***, 196 S.W.3d 131, 135 (Tenn. Ct. App. 2005) (citing ***Mitts v. Mitts***, 39 S.W.3d 142, 144-45 (Tenn. Ct. App. 2000)). Thus, this court must affirm if there is any material evidence to support the trial court's concurrence with the special master's findings as to classification. ***Archer***, 907 S.W.2d at 415.

D.

Husband submits that the trial court erred in classifying 100% of Raymond James Account # 74254867 as marital property. Husband contends that at the time of the marriage, the value of Account # 74254867 was at least $169,650. He notes that the annual rate of return for this account from 1989 to 2005 was 7.49% and that only $189,000 was contributed to the account after the parties married. Husband claims that a simple calculation starting with a premarital value of $169,650 and an annual return of 7.5% shows that the value of the premarital portion of the account is $539,621. Therefore, according to Husband, the marital portion of the account is $649,118 and that is the only part of that account subject to equitable distribution.

Wife's expert claimed that Husband's account, which began at J.C. Bradford and then went through a progression of transfers from Morgan Keegan to Hilliard Lyons before it was finally established with Raymond James, has been turned over so many times that there is no way to properly trace the assets back to their source.

The special master assigned a value of $1,188,739 to the account and classified it as marital property. The trial court concurred in the finding. Wife argues that the concurrent findings of the special master and the circuit court, being conclusive, should not be disturbed on appeal.

The General Assembly defines "separate property" as:

> (A) All real and personal property owned by a spouse before marriage, . . .;
>
> (B) Property acquired in exchange for property acquired before the marriage;
>
> (C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1);
>
> (D) Property acquired by a spouse at any time by gift, bequest, devise or descent;
>
> (E) Pain and suffering awards, victim of crime compensation awards, future medical expenses, and future lost wages; and
>
> (F) Property acquired by a spouse after an order of legal separation where the court has made a final disposition of property.

Tenn. Code Ann. § 36-4-121(b)(2) (2005). The Tennessee legislature provides the following definitions for "marital property" in a divorce action:

> (A) "Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce . . . .
>
> (B) "Marital property" includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage.

> (C) "Marital property" includes recovery in personal injury, workers' compensation, social security disability actions, and other similar actions for the following: wages lost during the marriage, reimbursement for medical bills incurred and paid with marital property, and property damage to marital property.

Tenn. Code Ann. § 36-4-121(b)(1) (2005).

As the Tennessee Supreme Court noted in ***Langschmidt v. Langschmidt,*** 81 S.W.3d 741, 749 (Tenn. 2002), "[r]etirement benefits accrued during the marriage clearly are marital property under Tennessee law." Under the facts of the case before it, the Court concluded that the IRAs at issue were funded with premarital assets and did not represent deferred compensation during the marriage. ***Id.*** at 749. The Court determined that due to the fact that husband owned the IRAs and funded them prior to the marriage, the IRAs remained his separate property. ***Id.*** The Court indicated that the appreciation of IRAs during the marriage could properly be considered marital property if "both parties 'substantially contributed to [the IRAs'] preservation and appreciation.'" ***Id.*** (citing Tenn. Code Ann. § 36-4-121(b)(1)(B) - 121(b)(2)(c)). Thus, in order to support a finding of substantial contribution, the Court required some connection between the marital efforts of a spouse and the appreciation of the separate property. ***Id.*** at 746, 750.

In ***Smith v. Smith***, 93 S.W.3d 871 (Tenn. Ct. App. 2002), a panel of this court held that two IRAs established prior to the marriage and supplemented during the marriage with marital funds contained identifiable marital and separate property. ***Id.*** at 879. The separate property consisted of the funds contributed prior to the marriage and the appreciation during the marriage attributable to the premarital contributions. ***Id.*** The court rejected the contention that the IRAs had become a marital asset by virtue of the doctrine of commingling. ***Id.*** The court further held that the increase in value of separate property during the marriage is not marital property unless the spouse claiming a portion of the increase substantially contributed to its preservation and appreciation during the marriage. *See* Tenn. Code Ann. § 36-4-121(b)(1). Without proof of such contribution, the increase in value remained separate property.

The trial court in the instant case concurred with the finding of the special master that the property was 100% marital. Classification is a fact issue that was properly before the master. ***Bilyeu,*** 196 S.W.3d at 135. This court must affirm if there is any material evidence to support the trial court's concurrence with the special master's findings as to classification. ***Archer***, 907 S.W.2d at 415. There is material evidence in the record to support the subject finding and there is also material evidence supporting Husband's position. However, given our standard of review on this issue, the latter is immaterial. Accordingly, we find no abuse of discretion by the trial court.

E.

Husband contends that the trial court erred in failing to recognize that Husband's disability insurance proceeds remained his separate property. Husband's claim for benefits under two disability insurance policies arose in 1994 when Husband lost his ability to perform microsurgery as a result of a venous ulcer on his leg. The monthly payments amounted to $540,000 through 2005. According to Husband, the proceeds were placed in a savings account in his name alone. In April of 2005, the account contained $890,953.

Husband contends that in ***Gragg v. Gragg***, 12 S.W.3d 412 (Tenn. 2000), the Supreme Court held that disability benefits are not included in the definition of marital property. The Court in ***Gragg*** held that

> [s]ince the future income of each spouse is not classified as marital property, disability benefits which replace future income should not be classified as marital property.

Id. at 418. Husband asserts that because disability benefits compensate for loss of good health and replace lost earning capacity, they are personal to the spouse who receives them. Husband acknowledges that the definition of marital property was changed in 2000 to add the following:

> "marital property" includes recovery in personal injury, workers' compensation, social security disability actions, and other similar actions for the following: wages lost during the marriage, reimbursement for medical bills incurred and paid with marital property, and property damage to marital property.

Tenn. Code Ann. § 36-4-121(b)(1)(C). However, Husband claims that, even as amended, the definition of marital property does not cover insurance payments from an own-occupation policy that did not replace lost wages. According to Husband, the payments under the policy compensated him for losing a valuable skill that enabled him to produce the same amount of income faster and more easily.

Out of the savings account, Husband paid off the $600,000 mortgage in the parties' joint names on the house at Ballard Bluff Circle and bought a 2006 BMW for $107,875. Husband claims that he did not consider the funds in that account to be marital property subject to the automatic injunctions provided in Tenn. Code Ann. § 36-4-106(d). He argues that the only evidence about the use of the funds and the timing of the payments completely rebuts the presumption that Husband intended to make the payments a gift to the marital estate.

Wife contends that the settlement proceeds received by Husband during the marriage and deposited into the First Tennessee Bank account were properly found to be marital property because

these funds replaced income Husband otherwise would have earned during the marriage.[5] Wife asserts that just as recoveries of lost wages in the actions described in the statute are deemed to be marital property, the insurance payments substituting for earnings received during the marriage should be considered to be marital property as well.

The special master and the trial court concurred in finding that the disability insurance proceeds collected by Husband as of the date of the hearing were marital property. Wife asserts that all the evidence in this case supports the concurrent finding of the special master and the trial court that the lump sum payment of $525,000 received in 2001 and the $9,000 per month received from January 2001 until the divorce are marital property, as these sums represented recovery for income lost during the marriage. As noted by counsel for Wife, although it is not explicit in Husband's settlement agreement with UnumProvident, the lump sum payment of $525,000 would represent an amount close to $7,300 per month from about the time that Husband's claim for disability benefits arose in 1994 until the time Husband settled his claim in January of 2001. From 1990 until 1995 when Husband left the Plastic Surgery Group, his income had been between $600,000 and $700,000 per year. Then, in 1995, Husband's income dropped to about half that amount. Thus, the evidence clearly supports the finding that the payment of $525,000 and the $9,000 per month received during the marriage represented recovery for income lost during the marriage and was therefore properly classified as marital property.

F.

Husband argues that the trial court erred in holding that 100% of Raymond James Account # 79646257, Husband's "cash" account, was marital property. The account, originally in Husband's name alone, was moved to Hilliard Lyons in 1999, at which time Wife's name was added to it. Husband explained that the account became a joint one with right of survivorship because he was having health problems at the time and desired for Wife to have the money if anything happened to him. Husband submits, however, that the evidence refutes the presumption that he intended the premarital portion of the fund to be a gift to the marital estate. Wife claims that Husband told her several times that they were in a 50/50 relationship, assertions which led Wife, in turn, to put Husband's name on her investment account.

Husband asserts that he had been accumulating the funds in this account to build the surgery center. He contends that, in 1997, while the account was still in his name alone, he placed $943,000, the proceeds from the sale of certain premarital assets (Jarnigan Road, two condominiums, and the settlement he received from the Plastic Surgery Group), in this account. An expert's calculation of the premarital funds in the account as of the end of 2005 was $998,388. At the time of the division of property, the total amount contained in the account was $1,960,694.

[5]Wife has not claimed any interest in Husband's right to post-marital payments of $9,000 per month which he will receive until October 2012. She agrees that these payments are Husband's separate property as so found by the trial court and were properly awarded to Husband.

Wife contends that the action of placing the funds in the parties' joint names resulted in a transmutation of the property from being separate to being jointly owned. In ***Batson***, 769 S.W.2d at 858, this court held as follows:

> One method of causing transmutation is to purchase property with separate funds but to take title in joint tenancy. This may also be done by placing separate property in the names of both spouses.

When a spouse titles property in the parties' joint names, the spouse creates a rebuttable presumption of a gift to the marital estate. *See* ***Eldridge v. Eldridge***, 137 S.W.3d 1, 14 (Tenn. Ct. App. 2002); ***Barnhill v. Barnhill***, 826 S.W.2d 443, 452 (Tenn. Ct. App. 1991). In ***Langschmidt***, 81 S.W.3d at 747, the Supreme Court stated that:

> [t]he rationale underlying [commingling and transmutation] is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Although "commingling" does not occur when separate property can be traced to its product, that is not the case with "transmutation." ***Id.*** The fact that it may be possible to trace an asset back to separate property is irrelevant for the purposes of rebutting the presumption of a gift to the marital estate created by "transmutation."[6]

The trial court concurred with the special master's finding that when Husband voluntarily made Account # 79646257 a joint account, he "intended to convert it to marital property." According to the trial court, "[w]hen that occurred, the account became marital property by way of transmutation." The court indicated that there was some evidence in the record to support Husband's contention that his separate contributions could be traced and separated to some extent, but found that the testimony in the record clearly supported the finding of transmutation of the separate funds to marital property.

Once the fact of the transfer of separate property to joint names was established, it was then Husband's burden to rebut the presumption of a gift to the marital estate. This must be done by presenting evidence of circumstances or communications "clearly" indicating an intent that the property remain separate. ***Id***. The evidence presented by Husband does not support a rebuttal of the presumption. Without such evidence, the property must be considered to be marital property. The concurrent findings of the special master and the trial court are supported by material evidence in the record.

[6]Of course, the "tracing" concept may be important with respect to the issue of equitable division.

G.

Tenn. Code Ann. § 36-4-121(c) provides as follows:

> (c) In making equitable division of marital property, the court shall consider all relevant factors including:
>
> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
>
> (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
>
> (6) The value of the separate property of each party;
>
> (7) The estate of each party at the time of the marriage;
>
> (8) The economic circumstances of each party at the time the division of property is to become effective;
>
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
>
> (10) The amount of social security benefits available to each spouse; and
>
> (11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c)(2005).

As to the factor of duration of the marriage, Husband claims that this 16-year marriage was of "a relatively short duration." There were no children born to the marriage. Husband already had a 22-year career and was at the peak of his earning capacity at the time of the marriage. Wife contends that the duration of the marriage cannot be characterized as "relatively short." She notes that a marriage of 22 years has been characterized as "long-term," ***Heikkenen v. Heikkenen***, No. M2005-01084-COA-R3-CV, 2007 WL 1411842, at *5 (Tenn. Ct. App. M.S., filed May 11, 2007), whereas a marriage of only 7 years has been characterized as of "relatively short duration," ***Batson***, 769 S.W.2d at 859. She contends that it is significant that the parties married in their mid to late 40s.

Regarding the factor of the age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities, and financial needs of each of the parties, Husband argues that Wife is in good physical condition. He contends that Wife gained marketable skills as manager of Husband's medical practice. Wife, who can speak three languages fluently, is also an accomplished artist whose paintings, according to Husband, could be marketed, providing her with an additional income. Husband asserts that there is no evidence of record of anything that would prevent Wife from working in the future. On the other hand, Husband notes that he has had significant physical problems. In addition to the ulcerated leg, he has thyroid problems and emotional difficulties. His children testified that they were concerned about his emotional state.

Husband further relates that during the pendency of the divorce, Dr. Chase left Husband's practice, leaving Husband to struggle on as a sole practitioner with a potentially large debt to manage. Husband testified that as of the date of the last hearing, he was not taking any money out of the practice. In connection with his investment in Premier Log Homes, Husband signed a guaranty for $500,000 of the corporation's debt.

Wife claims that although she learned to be a manager of a medical practice, there is no evidence that she would be able to apply her skills in the future, since she is no longer married to a controlling medical partner and is now 64 years old. She further observes that although Husband is 65, he is still practicing surgery and there was no evidence presented that Husband's emotional condition has impaired his ability to do his work.

As to the investment in the log home business, Wife noted that although Husband had signed the guaranty on the $500,000 loan, no evidence had been presented that Husband would become indebted for any amount of this loan. She observes that the loan was also secured by a third-party's real property valued at about $300,000. In exchange, Husband had received a 10% interest in Premier Log Homes for his investment of $71,500 that Husband testified was a "great investment."

As to the factor concerning the tangible or intangible contribution by one party to the education, training or increased earning power of the other party, Husband argues that during the marriage, Wife's earning power increased dramatically through her association with his practice. Husband further observes that Wife was able to attend art classes during the marriage – classes that have enhanced her artistic skills. Husband asserts that, to the contrary, there is no proof that Wife

contributed to his education, training, or increased earning power. Wife responds that there was evidence that she had made both tangible and intangible contributions to Husband's earning power.

Concerning the relative ability of each party for future acquisitions of capital assets and income, Husband claims that as to future income, Wife has the ability to earn a substantial salary. Husband notes that while he still has his practice, at his age and with his physical and mental conditions, along with the circumstances in which he finds himself, his ability to earn an income will be seriously impacted.

Wife contends that Husband has a greater earning capacity than does she, as Wife was not working other than in a volunteer capacity at the time of the divorce and was attending school to obtain a bachelor's degree. While it can be said that Wife gained skills as a manager in a medical office during her marriage, Wife claims it should be recognized that a job in Husband's practice may have been more readily available for her to acquire and easier to keep than work in any other similar office.

Another factor to consider is the contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role. Husband contends that there is no proof in this record that Wife contributed to the preservation or appreciation of Husband's separate property. Husband does not dispute the fact that Wife was a valuable employee in Specialists in Plastic Surgery for the last ten years of the marriage and for which she received a substantial salary and bonuses. However, he asserts that all the assets acquired during the marriage can be traced to Husband's earnings, and he made the investment decisions that resulted in the appreciation of those assets. On the other hand, he claims that Wife's separate property can also all be traced to Husband's efforts. The $300,000 insurance payment she received at the death of her son came from Husband's insurance policy and Husband served as executor of the son's estate.

As to the value of the separate property of each party, the special master found that Wife has separate property worth $318,979 and Husband's separate property totals $614,824.

Concerning the estate of each party at the time of the marriage, Wife had some funds from her ex-husband but does not know how much. She had approximately $18,000 or $20,000 left to her by her parents or grandparents. Husband owned the house on Jarnigan Road for which he paid $238,500 (later sold for $615,570). He had $169,000 in an IRA. He owned two condominiums which he sold in 1993 for $104,020. He paid $140,000 for the lot on Ballard Bluff a month before the marriage. According to Husband, the first $400,000 used in constructing the home came from funds earned prior to the marriage. Finally, he earned $600,000 to $700,000 per year.

As to the economic circumstances of each party at the time of the divorce, Wife claims Husband will be in a superior position to her situation, as Wife will be unemployed and attending

school, and Husband will be practicing his specialty as a plastic surgeon, it being his stated intention that he will not retire. Although Husband claimed he was making less in his medical practice at the time of the divorce as compared to earlier years, his earning power greatly outpaces that of Wife.

Another factor to be considered concerns the tax consequences to each party, costs associated with the reasonably foreseeable sale of an asset, and other reasonably foreseeable expenses associated with an asset. The full $1.5 million value of the house on Ballard Bluff was assigned to Husband with the obligation to pay Wife $200,000 when the house is sold, or within 5 years, whichever comes first. Interest of 10% will accrue on the $200,000 obligation from the date of the entry of the judgment until paid. Husband argues that he will incur an expense of approximately $90,000 in real estate fees (6% of $1.5 million) to sell the house. Husband additionally claims that Wife got most of the after-tax assets. Husband notes that his interest in Raymond James SEP Account # 74254674, Raymond James IRA Account # 74254867, and Raymond James Account # 79645875, a total of $813,948, will be subject to taxes when they are received. While Husband acknowledges that Wife will incur some taxes when she withdraws cash from some of the accounts, he asserts the tax burden for her will be significantly less than it will be for him.

Wife contends that the tax consequences with regard to the distribution of the marital estate were not the subject of testimony in the hearing of this case, and the application of this factor is too speculative to warrant consideration upon appeal. She also notes that there was no evidence that Husband had plans to sell the marital residence. As acknowledged, both parties will be subject to some taxation upon the withdrawal of funds awarded to them from some of the accounts; She notes that Husband's tax burden will naturally be greater because he was awarded a greater percentage of these accounts.

Neither party introduced evidence about the social security benefits factor. As to such other factors as are necessary to review in order to consider the equities between the parties, Husband claims that he raised Wife's two children from a prior marriage. He relates that the oldest child had a problem with drug addiction almost from the beginning of the marriage, and that Husband paid for special schools and the youth's treatment long after he became an adult. Husband notes that he gave the youngest son a $38,000 automobile shortly before the fatal accident that took his life and sent him to a private high school and to college. Husband claims that the enormous contribution he made to Wife and her two sons is not acknowledged by the special master or the trial court.

Tenn. Code Ann. § 36-4-121(c) provides that the trial court is to consider all "relevant" factors when dividing marital property. There were many such factors in this case. Some of these factors, and the evidence presented in support of them, weighed heavily in favor of Husband. On the other hand, some of the evidence weighed in Wife's favor. Implicit in the trial court's decision regarding division of the parties' marital property were credibility determinations because the parties' testimony was not always in agreement. In view of these credibility determinations, it is not for us to say what we would have done if we had been the original finder of fact because, simply stated, we were not. In practically all divorce cases, there is a spectrum of decisions regarding property division that could be made within the trial court's broad range of discretion. In the instant

case, we cannot say that the trial court's decision regarding an equitable division of marital property fell outside the permissible range. The evidence presented with respect to the various arguments of the parties does not preponderate against the trial court's award. The court acted within its broad discretion. *See* ***Harrington v. Harrington***, 798 S.W.2d 244, 245 (Tenn. Ct. App. 1990) (citing ***Pennington v. Pennington,*** 592 S.W.2d 576 (Tenn. Ct. App. 1979)). Certainly, the evidence does not preponderate against the trial court's finding that the division of property is equitable to both parties.

V.

The judgment of the trial court is reversed in part and affirmed in part. Exercising our discretion, the costs on appeal are taxed to the appellant, John David Franklin. This case is remanded to the trial court for enforcement of the trial court's judgment as changed by this opinion and for collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE